

Office of Chief Counsel  
Internal Revenue Service

memorandum

CC:LM:CTM:SD:POSTF-136036-02

RECudlip

date:

to: Terrence Daleiden, Revenue Agent, EG 1236  
450 Golden Gate Avenue, San Francisco, CA 94102

from: LMSB Practice Group, San Diego

subject: Advisory Opinion regarding Form 872

Taxpayer: [REDACTED], L.L.C.

EIN: [REDACTED]

Address: [REDACTED]

This memorandum responds to your request for advice concerning the proper party to execute a consent to extend the period of limitations.

ISSUE

Who is the proper party to execute a consent to extend the period of limitations for [REDACTED], L.L.C.'s (" [REDACTED] ") Form 1065 for taxable year ending December 31, [REDACTED] ?

CONCLUSION

For taxable year [REDACTED], the Tax Matters Partner ("TMP") listed on [REDACTED]'s [REDACTED] return was [REDACTED] Inc. (" [REDACTED] "), a [REDACTED] corporation. [REDACTED]'s representative states that [REDACTED] "reincorporated" in the [REDACTED] in [REDACTED] under the name of [REDACTED]. We are not certain, that to be able to reincorporate, the [REDACTED] corporation liquidated or dissolved. A liquidation or dissolution would have terminated [REDACTED]'s TMP designation. It is our understanding that you do not have any current address for [REDACTED], beyond that which appeared on its return for taxable year [REDACTED].

To our knowledge, assuming, arguendo, [REDACTED] liquidated or dissolved, [REDACTED] has not designated a successor TMP. Under the regulations the partner with the largest profits interest at the end of the [REDACTED] taxable year would succeed to the designation of TMP. Since [REDACTED]'s only other partner was [REDACTED], Inc. (" [REDACTED] "), a [REDACTED] corporation, an S corporation with a [REDACTED] % interest, [REDACTED] may have become the TMP for [REDACTED]. Although

██████████ has not filed a tax return since its taxable year ending ██████████, it recently filed (██████████) a Disclosure Statement stating that its ██████████ return included a listed tax shelter transaction (██████████).

Given the uncertainty surrounding the continued existence of the TMP designated on the ██████████ return, ██████████, and the continued existence of the potential successor TMP, ██████████, we think you should obtain Forms 872-I (Consent to Extend the Time to Assess Tax and Tax Attributable to Items of a Partnership) from ██████████'s partners or their successors in interest, if any.

You would need to obtain the Forms 872-I from ██████████, Limited, formerly known as ██████████, Inc. Under ██████████ law, even if ██████████ is dissolved, its corporate existence continues for limited purposes. If the ██████████ Form 1120 was a consolidated return, the caption of the form 872-I should reflect that the return was for a consolidated group, and should also reflect the change in name.

The other partner was an S corporation, ██████████. ██████████'s shareholders consisted of ██████████. You will need to obtain signed Forms 872-I from the ██████████, i.e., ██████████ (and ██████████ if the ██████████ income tax return was a joint return) and from ██████████, who filed a joint ██████████ return.

#### FACTS

This opinion is based on the facts stated herein. If the facts are not as stated herein, you should contact us as our advice may change.

You wish to conduct an income tax examination of ██████████, L.L.C.'s Form 1065, partnership return of income, for the taxable year ending December 31, ██████████. You wish to obtain a consent to extend the period of limitations. You have asked for our assistance in identifying the proper party to execute the consent.

██████████, L.L.C. ("██████████") is a limited liability company formed under Delaware law on ██████████.

██████████ filed a partnership return for its first taxable year ending December 31, ██████████. ██████████ did not clearly indicate on the return whether it believed it was subject to the consolidated audit procedures of I.R.C. sections 6221 through 6233 ("the TEFRA provisions"). On page two, Schedule B, "Other Information", line 4, ██████████ placed an X in the "No" box

indicating that it was not subject to the TEFRA provisions. Line 4 instructs the taxpayer that if the "Yes" box is checked, it should complete the information at the bottom of that page designating a tax matters partner ("TMP"). Despite [REDACTED]'s checking the "No" box, it designated as TMP [REDACTED].

[REDACTED] did the same thing on its returns for the taxable years ending December 31, [REDACTED], and [REDACTED], except that it designated [REDACTED], Inc., a C corporation, as TMP on both the returns.

[REDACTED] indicated on its return for the taxable year ending [REDACTED], that as of that date it became a single member limited liability company and that future income would be reported on that member's (i.e., [REDACTED], Inc.'s, an S corporation) corporate income tax return

[REDACTED]'s [REDACTED] return was received by the Service on [REDACTED].

A review of [REDACTED]'s [REDACTED] return, specifically the forms K-1, discloses that there were [REDACTED] different partners at various times during [REDACTED]. At the beginning of the year there were [REDACTED] partners. [REDACTED] of the partners were [REDACTED]: [REDACTED] and [REDACTED]. The [REDACTED] partner was a [REDACTED], [REDACTED], Inc. At the end of the year, there were two partners, [REDACTED], [REDACTED], Inc., and [REDACTED], Inc.).

#### I. Information about [REDACTED], Inc.

We believe that [REDACTED], Inc., is a C corporation formed in [REDACTED]. A LEXIS search discloses that a [REDACTED] corporation known as [REDACTED], may have been formerly known as [REDACTED]. The Service's copy of [REDACTED]'s Form 1120, corporate income tax return, for taxable year [REDACTED] indicates that it was "(formerly) [REDACTED]." It appears that [REDACTED] signed [REDACTED]'s return as a vice-president. Attached to that return is an application for an extension of time to file completed in [REDACTED], Inc.'s name. Also attached to that return is some information regarding a merger between [REDACTED], Ltd., and a subsidiary, [REDACTED], Inc. The signatures indicate that [REDACTED] is a vice president of both of the merging entities. The return also reflects that [REDACTED]% of the voting stock of [REDACTED] is owned by [REDACTED]. We also note that the return does not have the box "final return" checked. Based on our review of these documents, it is our opinion that sometime between the execution of the

application for the extension of time to file the return on [REDACTED], and the filing of the return in [REDACTED], [REDACTED], Inc., changed its name to [REDACTED], Ltd.

Additional information about [REDACTED], Inc., has been obtained from [REDACTED]'s representative that [REDACTED], Inc. was formed in the [REDACTED]'s, and that its stock was owned by [REDACTED]. In the mid-90's, it was owned [REDACTED] % each by [REDACTED] and [REDACTED] ([REDACTED]), [REDACTED] % by [REDACTED] (a [REDACTED] citizen), and [REDACTED] % by [REDACTED] (or [REDACTED]). Sometime in [REDACTED], [REDACTED] and [REDACTED] invested some additional capital and their interests each increased to [REDACTED] %, reducing proportionately the interests of the others. According to [REDACTED], [REDACTED] reincorporated in the [REDACTED] as [REDACTED] in [REDACTED], with the ownership remaining unchanged.

## II. Information about [REDACTED], Inc.

[REDACTED], Inc. ("[REDACTED]"), is an S corporation incorporated in [REDACTED] on [REDACTED] according to LEXIS legal research services.

According to the Service's computer records, [REDACTED], Inc.'s last filed return was for the taxable year ending [REDACTED]. The agent requested a copy of that return quite some time ago but has not received a copy. We do not know whether it was marked "final return." According to IRS records, [REDACTED], Inc.'s address is [REDACTED].

According to [REDACTED]'s representative, [REDACTED] had two [REDACTED] % shareholders, each being a [REDACTED], one established by [REDACTED], and the other by [REDACTED]. From [REDACTED] through [REDACTED], [REDACTED] was president, and [REDACTED] was some kind of an officer. In [REDACTED], the stock owned by the [REDACTED] was sold to [REDACTED], at which time both [REDACTED] and [REDACTED] resigned their positions as officers.

The LEXIS records indicate that another [REDACTED] corporation, [REDACTED], was incorporated [REDACTED], and that its president was [REDACTED], and its secretary/treasurer was [REDACTED].

[REDACTED]'s representative did not have specific ownership information about [REDACTED], but said that the ultimate [REDACTED] interest is held by [REDACTED].



on, and which is not a corporation or a trust or estate within the meaning of the Code.

Limited liability companies ("LLCs") in most jurisdictions may be classified for Federal tax purposes either as partnerships or associations that are taxable as corporations, depending on the characteristics of the LLC. See, e.g., Rev. Rul. 88-76, 1988-2 C.B. 360; Rev. Rul. 93-38, 1993-1 C.B. 233. [REDACTED] filed a partnership return. Treasury Regulation section 301.6233-1T(a) provides that the TEFRA provisions and the regulations thereunder apply with respect to any taxable year of an entity for which such entity files a partnership return.

TEFRA contains a provision providing that partnerships do not include partnerships having 10 or fewer partners at any one time during the partnership taxable year. This provision is known as the small partnership exception. Prior to [REDACTED]'s initial taxable year, this exception was only available if all of the partners were natural persons (other than a nonresident alien) or an estate, and each partner's share of each partnership item was the same as his share of every other item. As part of the Taxpayer Relief Act of 1997, P.L. 105-34, TEFRA was amended, effective partnership years ending after August 5, 1997, which would include [REDACTED]'s initial tax year, to extend the small partnership exception to apply to partnerships with 10 or fewer partners each of whom may be an individual (other than a nonresident alien), a C corporation, or an estate of a deceased partner. I.R.C. § 6321(a)(1), and Treas. Reg. § 301.6231(a)(1)-1(a)(1).

Under Treas. Reg. section 301.6231(a)(1)-1(a)(3), the determination of whether a partnership falls within the requirements for the small partnership exception is made with respect to each taxable year.

According to I.R.C. section 6231, a partnership may elect to have the TEFRA provisions apply for any taxable year, in which case it applies to that taxable year and subsequent years unless revoked by the Service. Treasury Regulation section 6231(a)(1)-1(T) provides the following method for making the election: A partnership shall make the election by attaching a statement to the partnership return for the first taxable year for which the election is to be effective. The statement shall be identified as an election under section 6231(a)(1)(B)(ii), shall be signed by all persons who were partners of that partnership at any time during the partnership taxable year to which the return relates, and shall be filed at the time (determined with regard to any extension of time for filing) and place prescribed for filing the partnership return. Simply indicating that a partnership is a

TEFRA partnership and placing the name of a purported TMP on a tax return would ordinarily not satisfy the election requirements since most, if not all, partnership returns are signed by only one partner.

**I. [REDACTED]'s return for taxable year [REDACTED]**

[REDACTED]'s partners at the close of its first taxable year on December 31, [REDACTED], were as follows:

- % - an individual, [REDACTED]
- % - an individual, [REDACTED]
- % - a C corporation, [REDACTED]

At no time during the taxable year [REDACTED] did [REDACTED] have more than 10 partners, and its partners included only individuals and a C corporation. For its taxable year ending December 31, [REDACTED], [REDACTED] came within the small partnership exception to the TEFRA provisions. Although such small partnerships are automatically excluded from being subject to the TEFRA provisions, they may elect to be covered by the TEFRA provisions, in which case the partnership would be subject to TEFRA for such taxable year and all subsequent taxable years. I.R.C. 6231(a)(1).

Since there was no election filed, and none effectively made on the return, it is our opinion that [REDACTED]'s [REDACTED] taxable year is not subject to the TEFRA unified audit procedures.

**II. [REDACTED]'s return for the taxable year [REDACTED]**

At the beginning of taxable year [REDACTED], [REDACTED] had the following partners:

- % - an individual, [REDACTED]
- % - an individual, [REDACTED]
- % - a C corporation, [REDACTED]

At the end of taxable year [REDACTED], [REDACTED] had the following partners:

- % - an S corporation, [REDACTED]
- % - a C corporation, [REDACTED]

Although [REDACTED] had fewer than 10 partners at any one time during taxable year [REDACTED], one of those partners was an S corporation. Because one partner was an S corporation, [REDACTED] did not fall within the small partnership exception to TEFRA for

████. Accordingly, █████ is subject to the TEFRA unified audit procedures for its taxable year █████.

On its tax return for █████, █████ identified its TMP as █████.

Under Treas. Reg. § 301.6231(a)(7)-1, a partnership may designate a partner as its TMP for a specific taxable year only as provided in the regulation. The regulation provides that a partnership may designate a TMP for a taxable year on the partnership return for that year. Accordingly, █████ Inc., was the validly designated TMP for █████'s taxable year █████.

Under the Treasury Regulations, a designation of a TMP may only be terminated as set forth in the regulation. A designation of a TMP for a taxable year remains in effect until one of the following termination events occurs:

- (i) the death of the TMP;
  - (ii) an adjudication by a court of competent jurisdiction that the individual designated as the TMP is no longer capable of managing the individual's person or estate;
  - (iii) the liquidation or dissolution of the TMP if the TMP is an entity;
  - (iv) the partnership items of the TMP become nonpartnership items under section 6231(c); or
  - (v) the day on which --
    - (A) the resignation of the TMP (by the filing of a notice with the IRS service center at which the partnership return for the affected year was filed);
    - (B) a subsequent designation under paragraph (d)(e), or (f) of sec. 301.6231(a)(7)-1.
- (d)- Designation of successor by TMP
- (e)- Designation of successor by general partners with a majority interest for that year (filed with service center);



(f)- Designation by partners with majority interest under certain circumstances (filed with service center);

(C) a revocation of the designation becomes effective.

Although [REDACTED], Inc., was the TMP designated on [REDACTED]'s [REDACTED] return, its current designation as TMP is uncertain. In light of the representative's statement that it reincorporated in the [REDACTED] in [REDACTED] under the name of [REDACTED], [REDACTED], we do not know whether [REDACTED] Inc., the [REDACTED] corporation, was liquidated or dissolved, either of which would terminate its designation as TMP.

If [REDACTED], Inc., liquidated or dissolved, we are not aware of [REDACTED] having designated any successor TMP.

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, (b)(7)a

Just as [REDACTED]'s existence is unclear, it is unclear whether [REDACTED] is still in existence. [REDACTED] is said to have been purchased by [REDACTED] in [REDACTED], and we do not know whether a merger may have occurred. The last return that the Service received from [REDACTED] was for its taxable year ending [REDACTED]. As part of the [REDACTED], however, the Service received a [REDACTED] from [REDACTED] reflected on its return for the taxable year ending [REDACTED]. The [REDACTED], was signed by [REDACTED], as vice president and treasurer of [REDACTED], and dated [REDACTED]. The [REDACTED] is not made by any corporate successor in interest. It is made by [REDACTED]. The address is that of [REDACTED]'s [REDACTED] in [REDACTED]: [REDACTED]. [REDACTED] of [REDACTED] conducted on [REDACTED], [REDACTED] stated he is currently in [REDACTED], and that his address there is [REDACTED].

As noted above, we are not certain that [REDACTED] ever liquidated or dissolved, terminating its designation as TMP. If

it did, and [REDACTED] became the successor TMP, we are not certain that [REDACTED] is still in existence.

Because of this lack of certainty, we recommend you obtain Forms 872-I (Consent to Extend the Time to Assess Tax and Tax Attributable to Items of a Partnership) from [REDACTED]'s partners or their successors in interest, if any. The TEFRA period of limitations is extended for partnership items as part of a consent executed under I.R.C. section 6501(c)(4) provided that the consent specifically states that it includes partnership items. I.R.C. § 6229(b)(3).

In this case, you would need to obtain a Form 872-I from [REDACTED]. Despite federal tax law providing that a dissolution or liquidation terminates a TMP designation, [REDACTED] law provides that a dissolved corporation continues its corporate existence and may do every act necessary to wind up and liquidate its business and affairs. [REDACTED]. Dissolution of a corporation does not prevent commencement of a proceeding by or against the corporation in its corporate name. [REDACTED]. Thus, even if [REDACTED] has dissolved, it could still consent to extend the period of limitations. If the [REDACTED] Form 1120 was a consolidated return, the caption of the form 872-I should reflect that the return was for a consolidated group. As [REDACTED] may have changed its name to [REDACTED], Ltd., the Form 872-I would be completed by [REDACTED], Ltd, formerly known as [REDACTED].

The other partner, [REDACTED], Inc., was an S corporation. Due to an amendment by the Small Business Job Protection Act of 1996, (P.L. 104-188), which repealed I.R.C. section 6241, S corporations are not subject to the TEFRA provisions, effective for taxable years beginning after December 31, [REDACTED]. In its [REDACTED] taxable year, [REDACTED]'s shareholders consisted of [REDACTED]. You will need to obtain signed Forms 872-I from the [REDACTED], i.e., [REDACTED] (and [REDACTED] if the [REDACTED] income tax return was a joint return) and from [REDACTED], who filed a joint [REDACTED] return.

If you have any questions, please direct them to the undersigned at (619) 557-6014.

**DISCLOSURE STATEMENT**

**This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.**

GORDON L. GIDLUND  
Associate Area Counsel (LMSB)

By: \_\_\_\_\_  
ROBERT E. CUDLIP  
Attorney (LMSB)